No. 82-1218

# In the Supreme Court of the United States

**October Term, 1982**

FLOWERS INDUSTRIES, INC., JERRY KRALIS, AND KRALIS BROS. FOODS, INC.,
*Petitioners,*

vs.

PETE HARDING BROWN AND MOTT'S INC. OF MISSISSIPPI,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITIONERS' REPLY MEMORANDUM

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The respondents never attempted and thus failed to make a *prima facie* showing of actionable conduct or contact with the forum. This state of things militates for summary reversal. However, respondents pretend that there is evidentiary support in the record for the assertion of jurisdiction. That is not so.

The unsubstantiated complaint, unsupported by affidavits, leaves one with at least the *doubt* of jurisdiction if not a required *legal presumption* that jurisdictional facts do not exist since respondents have not put them into the record after nine months of litigation.

This Court and the Supreme Court of Mississippi have both stated that where so much as a *doubt* of jurisdiction

is present *due process requires that the doubt be resolved against the existence of jurisdiction.*

In *Shaffer v. Heitner*, 433 U.S. 186, 211 (1977), the Court declared:

> . . . [W]*hen the existence of jurisdiction* in a particular forum under International Shoe is *unclear*, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of "fair play and substantial justice." *That cost is too high.*

The highest court in the forum State espoused the same attitude six years earlier in *Kaiser Co. v. Ludlow*, 243 So.2d 62, 67 (Miss. 1971):

> . . . In applying the so called long-arm statute the court should be sensitive to *any* conflict between letter of the law and traditional notions of fair play and substantial justice, and *if the latter is offended, the former may have to yield.*

It should have been perfectly clear upon the record made below that jurisdiction in the forum did not exist. The district court so concluded after finding that respondents had offered *no* proof to support jurisdiction. The Court of Appeals, however, faced with this same record purported to find within this *evidentiary vacuum* conflicting "facts" or something that made the existence of jurisdiction "unclear."

Rather than follow *Shaffer v. Heitner*, rather than acknowledge *Kaiser Co. v. Ludlow*, the Court of Appeals ignored the record deficit and deferred to an unsubstantiated complaint. That ruling puts no value at all upon the due process protection secured to the petitioners by the Constitution.

If the record *were* beclouded with the conflicting facts suggested by the Court of Appeals, the court's resolution

of such a conflict would yet be of doubtful legality in light of *Shaffer, supra.* But where the court pretends to resolve non-existent evidentiary conflicts and jurisdictional doubt upon dubious legal authority, the result obtained is unconscionable.

The mind-set which adopted this approach is unmasked in the Court of Appeals' outright misquote from *International Shoe.* They have transformed "fair play and *substantial* justice" to read "fair play and *effective* justice." *Id.*, 326 U.S. 310, 316 (1945). A want of *substance* in respondents' proof is excused as necessary to secure the *effect* respondents desired—an insupportable assertion of jurisdiction.

The respondents' short brief in opposition does not respond to the vast majority of petitioners' reasons for granting the writ. The brief response cites only two cases, neither of which supports respondents' opposition to the petition but both of which corroborate petitioners' case for review.

*United States Labor Party v. Oremus,* 619 F.2d 683, 687 (7th Cir. 1980), does not conflict, as suggested, with *Fine v. Paramount Pictures, Inc.* Rather it meshes; in *Oremus,* the Court found:

> . . . Since plaintiffs filed a *proper* Rule 59(e) motion *within* ten days . . . we have jurisdiction of the appeal.

(Emphasis added). Timeliness and legal sufficiency are distinct criteria. *Both* must be met.

The Court will recall that the district court below has specifically found that respondents' Rule 59(e) motion, though perhaps timely, was *not proper* and he expressly declined to entertain it for that reason. *Fine* is unscathed and *Oremus* will not resuscitate respondents' appeal time. But that aside, respondents have ignored or failed to ad-

dress the holding of *Wayne United Gas Company v. Owens-Illinois Glass Company*, 300 U.S. 131 (1937) which deprived the Court of Appeals of subject matter jurisdiction in the pending action when no appeal was taken within 30 days of the district court's judgment of dismissal. *Oremus* complements *Fine*. *Fine* follows *Wayne United*. But the Fifth Circuit followed neither.

Respondents' reliance on *World-Wide Volkswagen* is even farther misplaced, for that decision fairly mandates a summary reversal. There is not in the record the slightest attempt to show a single fact that any petitioner was tied to Mississippi by actionable "conduct and connection with the forum State . . . such that he should reasonably anticipate being haled into Court there." 444 U.S., at 297.

Had there been *any* facts of record useful in opposing the instant petition, surely those would have been set out in the brief in opposition. They are not.

Instead, respondents resorted, without having any choice in the matter, to quoting at length from the unsubstantiated complaint. To bolster the fragility of their position, respondents *falsely* claim that the affidavits of petitioners do not contradict the complaint. But consider the following.

The separate answers filed all denied the material allegations and *all* jurisdictional allegations. Only the petitioners gave affidavits acceptable to the district court as being competent and factual. Those affidavits state emphatically and expressly, among other things:

1. That petitioners have never committed a tort in whole or even in part in Mississippi;

2. That none of the petitioners has ever purposely or even inadvertently availed itself of any benefits, pri-

vate of protections afforded by the State of Mississippi;

3. That none of the petitioners have done any act to submit themselves to the long-arm jurisdiction of the forum;

4. That the allegations of the complaint charging commission of a tort in whole or in part in Mississippi are completely in error;

5. That the single long distance call into Mississippi was solely for the purpose of making a lawful inquiry of the United States Attorney who was performing his federal duty in his federal office building;

6. That the petitioners have not committed a tort in Mississippi *or anywhere else* against the respondents; and

7. That the denials asserted in the answer are true.

There is *nothing in the record to contradict these statements.*

If it is true as the Fifth Circuit asserts in *e.g., Black v. Acme Mkts., Inc.*, 564 F.2d 681, 683 n.3 (5th Cir. 1971), that an unsubstantiated complaint cannot overcome the defendants' jurisdiction affidavits, then the decision in the district court below should have been sustained.

The district court said:

*plaintiffs' affidavits are mere conclusions, unsupported by specific averments of fact.*

It is unthinkable that the Court of Appeals could find a *prima facie* showing of jurisdiction in such weightless documents.

## CONCLUSION

The respondents' brief in opposition attempts once again to grossly distort that which occurred below. Respondents do not distinguish and so ignore wholly several bases for certiorari, well-grounded in the decisions of this Court; we can but assume with clear justification that there is obviously less to their opposition and to the underlying case that has heretofore *failed* to meet the eye.

An affirmance would reward prior falsehood, indolence, and an utter want of ability to prove jurisdictional contact. We urge respectfully that if the judgment below be not summarily reversed, as would be appropriate, that a writ of certiorari issue to afford the plenary review for which there is indisputable need. Personal jurisdiction should never be sanctioned upon the foul and empty sort of record which these respondents made below if due process is to have any meaning and subjective value to ordinary litigants.

Respectfully submitted,

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